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Nos. 93-1456, 93-1828

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

U.S. Term Limits, Inc., et al.,

Petitioners,

v.

Ray Thornton, et al.,

Respondents.

On Writ of Certiorari To The
Supreme Court of the State of Arkansas

BRIEF OF VIRGINIANS FOR TERM LIMITS, NORTH CAROLINA TERM LIMITS COALITION, SOUTH CAROLINIANS FOR TERM LIMITS, LOUISIANA FOR TERM LIMITS, AND EIGHT IS ENOUGH AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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U.S. Term Limits, Inc., et al.,

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Brief of
Virginians For Term Limits,
North Carolina Term Limits Coalition,
South Carolinians For Term Limits,
Louisiana For Term Limits, And
Eight Is Enough As Amici Curiae
In Support Of Petitioner

INTEREST OF THE AMICI CURIAE

Amici are non-partisan, grassroots organizations seeking to provide the citizens and legislatures of their respective States with the opportunity to vote on ballot restrictions or term limits for long-term incumbents, including members of Congress. As advocates for this reform, amici believe that this case is of the highest importance and wish to have their views heard by this Court. Amici believe that the Arkansas law is constitutional, and that the Arkansas Supreme Court's decision to the contrary should be reversed.

These organizations, all from southeastern States, are at varying stages of grassroots work to educate the public about the desirability of term limits or ballot access restrictions for officials elected to both state and federal office. The Florida organization, Eight is Enough, was instrumental in placing an initiative like the Arkansas law before the electorate in Florida which was adopted by 77% of the voters. Louisiana for Term Limits, founded by former Governor Buddy Roemer, has done massive public education and lobbying efforts which it hopes will lead to similar principles being incorporated into the Louisiana Constitution by 1995. Obviously, the very existence of these organizations is vitally affected by the outcome of this case.

Although over 70% of the population of the United States favors limiting incumbents, *see* Joshua Levy, Note, *Can They Throw the Bums Out? The Constitutionality of State-Imposed Congressional Term Limits*, 80 Geo. L. J. 1913, 1916 (1992), the only feasible way to achieve this reform is through state legislative action or initiative. The Arkansas constitutional amendment was approved by a 59.9% vote. In the 1990s, ballot issues imposing term limits or ballot access restrictions upon Senators and House members were approved by "landslide majorities" in fourteen other States: Arizona 74%, California 63%, Colorado 71%, Florida 77%, Michigan 59%, Missouri 74%, Montana 67%, Nebraska 68%, North Dakota 55%, Ohio 66%, Oregon 69%, South Dakota 63%, Washington 52%, Wyoming 77%. Kris W. Kobach, *Rethinking Article V: Term Limits and the Seventeenth and Nineteenth Amendments*, 103 Yale L.J. 1971 and n. 1-2 (1994). Nine of these States adopted provisions virtually identical to those of Arkansas.

Two-thirds of Congress is unlikely to support a constitutional amendment to achieve electoral reform, because Congress itself is made up of incumbents who could lose their

seats as a result of term limits. A basic reform in the election process in this country could, however, be achieved through a process of incremental change at the state level. Two other popular movements to change the election process, culminating in the Seventeenth and Nineteenth Amendments, proceeded first through state-level action. Regardless of the prospects for a constitutional amendment, each of the Amici believes that the people of its State should have the opportunity to adopt some type of electoral reform for that State. Term limits initiatives, including ballot access rules such as the one at issue here, would help level the playing field between incumbents and other candidates and result in better representation for the people of each State.

STATEMENT OF THE CASE

Amici adopt the Statement of the Case set forth by Petitioners.

SUMMARY OF ARGUMENT

The Arkansas Constitution disables certain multiterm incumbents of the House of Representatives and United States Senate from having their names placed on the ballot for reelection to positions they have long held. Contrary to the holding of the Supreme Court of Arkansas, Arkansas Constitutional Amendment 73 fits easily within the parameters of the United States Constitution.

The United States Constitution provides broad latitude to the States to regulate the time, place, and manner of federal elections. Congress, through legislation, may in turn overrule such state regulations, thereby protecting federal interests. Arkansas' unwillingness to place certain multiterm incumbents' names on its ballots permissibly regulates the "manner" of such elections, for such incumbents may still be

reelected through write-in campaigns. Decisions of the Court confirm that Arkansas has acted well within its authority to "provide a complete code for congressional elections," *Smiley v. Holm*, 285 U.S. 355, 366 (1932). This ballot access restriction is not distinguishable from state-imposed waiting period rules, resign-to-run-rules, and rules prohibiting write-ins, all of which the Court has approved.

The Arkansas restriction on ballot access does not disqualify anyone from holding federal office. Therefore, it should not be evaluated under the Qualifications Clauses of Article I. If the Court does evaluate the provisions of the Arkansas Constitution at issue under these clauses, it should find them to be constitutionally sound. Properly read, these clauses establish only three minimum federal qualifications for office -- age, citizenship, and state habitancy. The text of several interrelated provisions of the Constitution, the history surrounding issues of qualifications for federal office, and contemporaneous practices all support the permissibility of Arkansas' ballot access restrictions. Neither *Powell v. McCormack*, 395 U.S. 486 (1969), nor any other decision of the Court is to the contrary.

The Tenth Amendment confirms that the States have extensive powers to enact restrictions on ballot access for multiterm incumbents. Historical authority indisputably supports this proposition. Moreover, the Court's decision in *Gregory v. Ashcroft*, 501 U.S. 452, 111 S. Ct. 2395 (1991), utilizes the "numerous and indefinite" powers remaining with the States to approve a state age limit for elected officials.

Finally, Arkansas' ballot access restrictions do not violate the First or Fourteenth Amendments. Arkansas has not invidiously discriminated against any protected class, nor has it barred from the ballot those holding or expressing any particular views. Indeed, it is less limiting on well-known

incumbents desiring further reelection than the restrictions approved by this court in *Burdick v. Takushi*, 112 S. Ct. 2059 (U.S. 1992).

ARGUMENT

I. ARKANSAS' BALLOT ACCESS RESTRICTION IS A CONSTITUTIONALLY PERMISSIBLE REGULATION OF THE "MANNER" OF ELECTIONS TO HOUSE AND SENATE POSITIONS.

As recently amended through a statewide initiative, the Arkansas Constitution forbids printing certain multiterm incumbents' names on ballots in House and Senate elections.[1/] The Time, Place and Manner Clause of the Constitution[2/] provides States with broad authority to conduct

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1/ The provisions of the Arkansas Constitution at issue read as follows:

> (a) Any person having been elected to three or more terms as a member of the United States House of Representatives from Arkansas shall not be certified as a candidate and shall not be eligible to have his/her name placed on the ballot for election to the United States House of Representatives from Arkansas.
>
> (b) Any person having been elected to two or more terms as a member of the United States Senate from Arkansas shall not be eligible to have his/her name placed on the ballot for election to the United States Senate from Arkansas.

Arkansas Constitutional Amendment 73 § 3.

2/ Article I, Section 4, clause 1 provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may (continued...)

congressional election. It also protects federal interests, for state regulations may be overridden by federal statute.[3/] The States could then overturn such a statute only through a constitutional amendment.[4/]

This case poses two questions under the Time, Place and Manner Clause. First, is Arkansas' refusal to print the names of certain incumbents on the ballot a regulation concerning the "manner" of congressional elections? Second, was Arkansas' statewide initiative a permissible process for enacting such an election regulation?

2/(...continued)
at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

3/ If the Court holds that Arkansas permissibly restricted the printing of multiterm incumbents on its ballots as a component of the state's regulation of the "manner" of elections, Congress could pass legislation requiring all states to permit the printing of the names of multi-term incumbents on their ballots.

4/ Any such constitutional amendment would be particularly difficult to adopt since the normal amendment route requires passage by two-thirds of both houses of Congress, and many congressional incumbents are hostile to the term limits movement. In the twentieth century, only one anti-incumbency proposal has ever come to the floor of Congress, and on that occasion it received only its sponsor's vote. Over 100 additional proposals have since died in committee. Historically, the most comparable situation to the instant case is the Seventeenth Amendment, which provided for direct election of Senators. In the nineteenth century, numerous proposals for direct election of Senators died in committee, killed by Senators selected by state legislatures. Only after 28 states, from 1905-1908, pushed their state legislators to be bound by the results of popular votes for Senate candidates did the Seventeenth Amendment move forward. Popularly-supported Senators transformed the previously-obstructionist Senate. The Amendment was then ratified less than eleven months after Congress' submission of it to the states. *See generally* Kobach, *supra* at 1976-79.

1. *Manner*. The Court has regularly permitted a wide range of state regulations concerning the "time, place and manner" of congressional elections. In *Smiley*, 285 U.S. at 366, for example, the Court noted that "these comprehensive words embrace authority to provide a complete code for congressional elections."[5/] Congressional authority to trump such state election codes is correspondingly broad. *See, e.g.* 2 U.S.C. § 9 (votes not by written or printed ballot or voting machine authorized by state law "of no effect") and 2 U.S.C. § 6 (reducing representation of States if right to vote abridged). *See also Oregon v. Mitchell*, 400 U.S. 112, 118-25 (1970) (opinion of Black, J.) (establishing voting age and voting districts are "manner" issues; Congress' power identical to state power but Congress is ultimate decision-maker). *See generally* Neil Gorsuch and Michael Guzman, *Will The Gentlemen Please Yield? A Defense of the Constitutionality of State-Imposed Term Limitations*, 20 Hofstra L. Rev. 341, 350 (1991) (reviewing the "scheme of shared power embodied in Article 1, section 4").

Three of the Court's cases powerfully affirm the breadth of state authority to refuse to print incumbents' names on ballots for congressional elections. In *Storer v. Brown*, 415 U.S. 724 (1974), the Court upheld a California "waiting period" law denying ballot access to independent candidates affiliated with a political party within the twelve months prior

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5/ The Court's broad reading of this clause is fully consistent with the ratification debates which focused on this clause. In these debates, Federalists argued that the states were given broad powers in the first instance to regulate elections, even to the point of abolishing federal elections, but that Congress could override state abuses by passing legislation to protect itself. The Anti-Federalists agreed that the clause had this breadth, and objected to Congress' plenary power to trump state regulation of federal elections. *See generally* Stephen J. Safranek, The Constitutional Case for Term Limits, at 3-13 (1993).

to the primary preceding the election. It brushed aside the claim that the States lacked authority under Article I to deny ballot access to a category of candidates as "wholly without merit." *Id.* at 736 n. 16. Similarly, *Clements v. Fashing*, 457 U.S. 957 (1982), upheld a Texas "resign-to-run" law requiring state officials to resign before running for state or federal offices.[6/] As in *Storer*, the Court assumed that the States had broad Article I authority to regulate the elections and focused on whether state law violated the First and Fourteenth Amendments. Finally, in *Burdick*, the Court upheld a Hawaii statute prohibiting write-in candidates altogether in congressional and other elections. The Court began its analysis by citing the Time, Place and Manner Clause and noted that "the Court therefore has recognized that States retain the power to regulate their own elections. *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 217 (1986)." 112 S. Ct. at 2063.

No principled distinction exists between these cases and the instant case. Like candidate waiting period rules, resign-to-run rules, and rules prohibiting write-ins, Arkansas' ballot rule involves the "manner" of elections. That such regulations "will invariably impose some burden upon individual voters" and candidates is not dispositive. *Burdick*, 112 S.Ct. at 2063. Indeed, the multi-term incumbent denied ballot access by Arkansas is no worse off than the recently-independent candidate permissibly barred from the ballot under *Storer* -- both must wage write-in campaigns to get elected. This is surely, as the Court said in *Clements*, a "de

6/ Technically, only the provisions affecting state office were before the Court since none of the plaintiffs sought to run for federal office. *Clements* overruled a substantial number of state court decisions which had found "resign-to-run" laws unconstitutional.

minimis burden on the political aspirations" of multiterm incumbents already well-known to the people. 457 U.S. at 958. From the perspective of the voter, he or she merely faces the minor inconvenience of writing in a name rather than punching a ballot or pulling a lever. This inconvenience is far less than that to the Hawaii voters in *Burdick*, who were unable to write-in candidates at all.

Initiative. The Time, Place and Manner Clause vests authority to adopt such regulations "in each State by the Legislature thereof." Because Arkansas adopted its ballot access restriction in a statewide initiative, not by passage of a statute, it might be argued that the people of Arkansas usurped a power allocated in the Constitution solely with the state legislative body.

The logical fallacy of this argument is simply stated and its rejection is compelled by the Court's precedents. As a matter of logic, the electorate in Arkansas both elects the legislators and gives them, from time to time, fundamental "marching orders" through initiative processes authorized by the Arkansas Constitution. It would be strange if the greater power of the people did not encompass the lesser power of their representatives to make law. Therefore, it is not surprising that the Court has concluded, in decisions going back nearly 80 years, that the word "Legislature" refers to "legislative power," not merely the "legislative body."[7/]

7/ The original United States Constitution did provide contrasting methods of selecting Senators and Representatives, so that "the Legislature" in Article I, Section 3, clause 1 could not be read to mean direct referendum processes without eviscerating the distinction drawn by the Framers in the processes for selecting holders of the two offices. No such counterpoint to "the Legislature" as that term is used in the Time, Place, and Manner Clause exists.

In *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916), the Ohio legislature redistricted the State for purposes of congressional elections. The people of Ohio by referendum disapproved the redistricting plan, and suit was filed to declare the referendum illegal under the Time, Place and Manner Clause. The Court unanimously upheld the referendum, saying "the referendum constituted part of the state Constitution and laws, and was contained within the legislative power." *Id.* at 568. The Court also explicitly rejected "the assumption that to include the referendum in the scope of the legislative power is to introduce a virus which destroys that power, which in effect annihilates representative government." *Id.* at 569. *See also Smiley*, 285 U.S. at 355 (including the Governor's veto as a part of "legislature" under this clause where that was part of state lawmaking process). Thus, because Arkansas law permits the people to vote directly on amendments to the state constitution, such direct votes are in fact exercises of power by "the Legislature" for Time, Place and Manner Clause purposes.

The Court's decisions also comport with congressional approval of state legislative power exercised through direct as well as representative processes. In each of the cases above, the Court buttressed its constitutional interpretation with references to federal law which validated state electoral regulations adopted "in the manner provided by the laws thereof," including referendum processes. Federal law even today ratifies such processes. *See* 2 U.S.C. § 2a(c) (federal rules for election of Representatives only "[u]ntil a State is redistricted in the manner provided by the law thereof after any apportionment").

II. ARKANSAS' BALLOT ACCESS RESTRICTION IS CONSTITUTIONALLY PERMISSIBLE UNDER THE QUALIFICATIONS CLAUSES OF ARTICLE I

Because the Arkansas Constitution does not prohibit anyone from campaigning for office, being elected, or serving in office, it should not be deemed a "qualification" for office at all.[8/] *See Hopfmann v. Connolly*, 746 F. 2d 97, 103 (1st Cir. 1984), *vacated in part on other grounds*, 471 U.S. 459 (1985) (test of whether a restriction is a qualification is "whether the candidate 'could be elected if his name were written in by a sufficient number of electors.'"). Thus, it is not necessary for the Court to reach the complex issue of whether Arkansas' ballot access restrictions are permissible under the Qualifications Clauses of Article I.[9/]

8/ Treatment of Arkansas' ballot provisions under the Time, Place and Manner Clause rather than the Qualifications Clauses would also have the desirable practical effect of preserving maximum flexibility for the political branches of government, since the former clause, unlike the latter clause, explicitly gives Congress the power to override state law. The state laws referred to *infra* at n. 28, which prohibit multiterm incumbents from further serving in certain offices, would provide a more appropriate opportunity for the Court to examine the scope of the Qualifications Clauses.

9/ Article I, Section 2, clause 2 provides: "No person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen."

Article I, Section 3, clause 3 provides: "No person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen."

The Qualifications Clauses merely establish Federal age, citizenship, and inhabitancy minimum requirements for House and Senate members. They do not preclude the people of the States from further limiting those who may represent them in Congress. Indeed, the Constitution's text and history, as well as contemporaneous practices, indicate that the Framers sought only to ensure that the States would not send unqualified elected officials to the new federal government.[10/]

1. *Text*. The Qualifications Clauses do not state that the three listed requirements are the *only* or the *exclusive* criteria which may be established for membership in the House or the Senate; they do not by their terms preclude States from adding qualifications consistent with those contained in the clauses. Conversely, Article I elsewhere uses explicit phrasing when exclusivity was intended. For example, Article I, Section 2, clause 5 gives the House "the sole Power of Impeachment" and Article I, Section 3, clause 6 gives the Senate "the sole Power to try all Impeachments." *See Nixon v. United States*, 113 S. Ct. 732 (U.S. 1993) (sole power language means courts cannot resolve claims that Senate improperly tried an impeachment). Article I, Section 8, clause 17 grants Congress the power "to exercise exclusive Legislation" concerning the District of Columbia and "like

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10/ As discussed more fully in Petitioner's Brief, the Court's decision in *Powell*, 395 U.S. at 486 is not to the contrary. The Court in *Powell* held only that one House of Congress could not, in its adjudicative capacity under Article I, Section 5, clause 1, add qualifications beyond those in the Qualifications Clauses. The concern of the Framers explored by the Court in *Powell* -- that incumbent members of Congress not be permitted to frustrate the will of electors within a state -- is wholly inapposite here, where the people of Arkansas concluded that their interests would be better served if long-term incumbents could be returned to Congress only if through ballot write-in campaigns.

Authority" with respect to Federal enclaves. Thus, the Framers well knew how to grant exclusive power over a given aspect of the federal structure.

Similarly, the Framers knew very well how to preclude the States from exercising particular powers, and did so explicitly on a number of occasions. For example, explicit bars on the States coining money, passing ex post facto laws, and impairing contracts were written into Article I, Section 10, clause 1. Prohibitions on state imposts and duties and war-related activities were made explicit in Article I, section 10, clauses 2 and 3 These direct prohibitions stand in marked contrast to the Constitution's silence on state power to add legislative qualifications.

Lastly, the Religious Test Clause of Article VI[11/] provides that "no Religious Test" may be imposed for membership in Congress.[12/] The existence of this clause is

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11/ The third clause of Article VI reads in full as follows:

> The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

12/ The Religious Test Clause was adopted against a background of preexisting religious tests for office-holding common to all states other than Virginia in 1787. Basically, "non-Christians" were barred from office in twelve of the original colonies, some colonies went even further in banning non-Protestants from office, and there were differences from state to state as to whether particular denominations were "Protestant" or not. *See generally* Gerard V. Bradley, *The No Religious Test Clause And*

(continued...)

of major significance in construing the Qualifications Clauses for two reasons. Most significantly, the existence of this clause in the original Constitution is another example that the Framers knew how to and indeed did bar one specific qualification which the States might otherwise have imposed on those seeking to represent them in Congress. Their failure to bar the States or their people from enacting term limits, property ownership or other qualifications indicates that, unlike religious tests, such matters were not precluded by the Qualifications Clauses. Additionally, the Religious Test Clause applies only to federal offices; religious tests for state offices were left intact by the preceding clause, which added an oath or affirmation to support the Constitution as a requirement for state as well as federal office-holders. A distinction was thus drawn between state officials, who could be required to take religious oaths, and federal office-holders, who could not. The Framers could have but did not draw such a federal/state dichotomy in the Qualifications Clauses; this demonstrates that no federal prohibition on further state qualifications was intended, either for federal or state offices.

2. *History*. Much historical evidence points to the conclusion that the Qualifications Clauses merely established minimum objective proxies for personal maturity, loyalty to the infant nation, and alignment with interests of the people and States represented in Congress. Most tellingly, Edmund

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12/(...continued)
The Constitution of Religious Liberty: A Machine That Has Gone Of Itself, 37 Case W. Res. 674, 681-87 (1987). The Framers made a distinct break from state practices when they adopted the Religious Test Clause for federal office virtually unanimously and without much debate. *Id.* at 687-94. Profound and explosive debate over the clause occurred during the ratification process, *id.* at 694-711, but when the dust settled, a clause which displeased many was simply left for further treatment in the First Amendment of the Bill of Rights.

Randolph's original version of this provision in the Committee of Detail had proposed language which would have made these qualifications exclusive.[13/] But this language was eliminated by the Committee on Detail in its report to the Constitutional Convention. 2 Farrand, *supra*, at 137 n.6, 178. It is almost unthinkable that this Court would read these clauses as establishing exclusive -- rather than minimum -- qualifications, for that would undo the work of the Committee on Detail adopted by the Constitutional Convention.

To be sure, the Constitutional Convention considered and rejected *federal* limitations on the membership of the House and Senate, such as property ownership requirements and term limits.[14/] Numerous statements of various Framers, some reviewed by the Court in *Powell*, 395 U.S. at 486, support the view that the Qualifications Clauses were not

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13/ The proposed language was:

"5. The qualifications of (a) delegates shall be the age of twenty five years at least, and citizenship: (*and any person possessing these qualifications may be elected except*)"

2 Records of the Federal Convention of 1787 139 (Max Farrand, ed., rev. ed., 1966) (hereinafter "Farrand") (emphasis added).

14/ The Constitutional Convention rejected provisions which would have established federal minimum property limitations, *see* 2 Farrand, *supra*, at 249, and federally-imposed limits on congressional terms. 1 Farrand, *supra*, at 20. The Constitutional Convention thus declined to follow the route of the Articles of Confederation, which had established as a matter of federal law that "no person shall be capable of being a delegate for more than three years in any term of six years. . . ." Art. of Confed. Art. V (1781).

intended to prohibit the States from adding to the minimum federal qualifications.[15/]

Both James Madison and Alexander Hamilton made statements that the qualifications for office were fixed by the Constitution. These statements, however, were in the context of the dangers of the *federal* government adding additional qualifications. Madison stated, in opposing a provision to empower Congress to set property qualifications:

> The qualifications of electors and elected were fundamental articles in a Republican Govt. and ought to be fixed by the Constitution. If the [federal] Legislature could regulate those of either, it can by degrees subvert the Constitution.

2 Farrand, *supra,* at 249-50. In The Federalist No. 60, Hamilton stated:

> The truth is that there is no method of securing the rich the preference apprehended but by prescribing qualification of property either for those who may elect or be elected. But this forms no part of the power to be conferred upon the national government. Its authority would be expressly restricted to the regulation of the *times*, the *places*, and the *manner* of elections. The qualifications of the persons who may choose or be chosen, as has been remarked upon other occasions, are defined and fixed in the Constitution, and are unalterable by the legislature.

The Federalist No. 60, at 371 (Clinton Rossiter ed., 1961) (hereinafter "The Federalist"). These comments did not imply any restriction against the States' setting qualifications. Indeed, Hamilton emphasized that the Framers "have submitted the regulation of elections for the federal government, in the first instance, to the local administrations." The Federalist No. 59, at 362-63.

Finally, Thomas Jefferson directly addressed the issue of whether the Constitution set forth exclusive or minimum qualifications for office as follows:

> But it does not declare, itself, that the member shall not be a lunatic, a pauper, a convict of treason, of murder, of felony, or other infamous crime, or a non-resident of his district; nor does it prohibit to the State the power of declaring these, or any other disqualifications which its particular circumstances may call for; and these may be different in different States. Of Course, then, by the tenth amendment, the power is reserved to the State.

Basic Writings of Thomas Jefferson 725 (Philip S. Foner ed., 1944).

3. *Contemporaneous Practice.* Lastly, three historical practices compellingly support the Framers' understanding that the Qualifications Clauses set forth minimum qualifications, not exclusive qualifications. First,

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15/ The Court has frequently turned to statements of the Framers for assistance in reconstructing the original understanding of the Constitution. *See generally* Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 Nw. U.L.Rev. 226 (1988).

two of the three restrictions contained in these clauses were determined at the time of the Constitution's ratification under state, not Federal, law. Citizenship varied from State to State,[16/] and residency or habitation was defined by each State. It would be exceedingly strange for the Constitution to have established federal minimum requirements dependent upon state law while implicitly withdrawing the ability of the States to add criteria they deemed appropriate for their elected House and Senate members.[17/]

Second, additional state requirements for the holding of office were common at the time of the Constitution's ratification. For example, Maryland, Massachusetts, New Jersey, North Carolina, and South Carolina required that legislators own property of varying amounts, while Pennsylvania required merely that legislators be "persons most noted for wisdom and virtue."[18/] Indeed, term limits were a popular reform in the 1770s, with seven States (Delaware, Georgia, Maryland, North Carolina, Pennsylvania, South Carolina, and Virginia) adopting varying term limits for

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16/ Congress enacted the first naturalization law in 1795, under its Article I, Section 8, clause 4 power to "establish an uniform Rule of Naturalization." Act of Jan. 29, 1795, ch. 20, 1 Stat. 414.

17/ *See* Roderick M. Hills, Jr., *A Defense of State Constitutional Limits On Federal Congressional Terms*, 53 U. Pitt. L. Rev. 97, 117-18 (1991).

18/ Md. Const. of 1776, art. II, *reprinted* in 3 Francis N. Thorpe, The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America 1669, 1691 (1909) (hereinafter "Thorpe"); Mass. Const. of 1780, part 2, ch. I, § III, art. III, *reprinted in* 3 Thorpe at 1888, 1898; N.J. Const. of 1776, art. III, *reprinted in* 5 Thorpe at 2594, 2595; N.C. Const. of 1776, art. VI, *reprinted in* 5 Thorpe at 2787, 2790; S.C. Const. of 1778, art. XII, *reprinted in* 6 Thorpe at 3248, 3250-51.

various offices.[19/] The Framers must have been aware of these varied state-by-state practices, for four state delegations to the Congress were themselves subject to term limits.[20/] Because such limits were common but not uniform, it is likely that no consensus was possible at the Constitutional Convention and that a uniform federal requirement would have lessened chances for ratification.[21/]

Third, the historical context for the State Electors Clause (Article 1, section 2, clause 1) provides strong support for the proposition that the States could add further qualifications to the federal age, citizenship, and inhabitancy minimums. The State Electors Clause provides that electors in each State who select House members "shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."[22/] Because the States did not permit legislators to be seated who were not qualified to vote as electors, this provision ensured that no lower

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19/ Gordon S. Wood, The Creation of the American Republic, 1776-1787 140-41 (1969) (summarizing state practices and noting that in 1776 term limits were a "cardinal tenet" of the American Whig principles).

20/ 3 Thorpe 1695-97, 4 Thorpe 2467, 5 Thorpe 3084-85, 6 Thorpe 3742-43.

21/ *See generally* Robert C. DeCarli, *The Constitutionality of State-Enacted Term Limits Under the Qualifications Clauses*, 71 Tex. L. Rev. 865, at 875-80 (1993) (lack of federal consensus to adopt any specific limitation where state practices varied indicates that additional qualifications could be added by the states).

22/ The Framers did not establish a parallel restriction concerning selection of Senators by state legislatures. The Seventeenth Amendment, which provided for direct election of Senators, added an identical requirement that electors for the Senate "have the qualifications requisite for electors of the most numerous branch of the State legislatures."

standards could be adopted for selection of House members.[23/] In light of the extensive restrictions which then existed on voting and service in state legislatures, it is simply not plausible that the Framers would explicitly incorporate such additional and varying state requirements for House positions while implicitly precluding application of state standards through the Qualifications Clauses.

III. THE TENTH AMENDMENT SUPPORTS STATE POWER TO RESTRICT MULTITERM INCUMBENTS IN HOUSE AND SENATE ELECTIONS.

The Tenth Amendment provides: "The powers not delegated to the United States, nor prohibited by it to the States, are reserved to the States respectively, or to the people." As the Court said in *United States v. Darby*, 312 U.S. 100, 124 (1941), the Tenth Amendment "states . . . that all is retained which has not been surrendered." This Amendment reinforces that the States and their people are empowered to add qualifications for congressional positions. Indeed, this interpretation is the only way to square the Qualifications Clauses with notions of Federalism reaffirmed by the Tenth Amendment. *See* Thomas Jefferson (Foner, ed.), *supra*, at 725.

The Court quite recently found that the Tenth Amendment supports state authority to impose hurdles or even absolute disqualifications upon candidates for office. In *Gregory* the Court upheld a term limit law ending terms of

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23/ New Jersey may have been an exception in restricting the vote to citizens and legal adults, without explicitly imposing similar restrictions on state legislators. New Jersey's property ownership limitation for service as a state legislator may mean that this exception was more apparent than real. *See generally* Hills, *supra*, at 103-06.

elected state judges at age 70. 111 S. Ct. at 2395. The Court's analysis was not simply that federal law (the Age Discrimination in Employment Act) was inapplicable; rather, the Court relied upon the Tenth Amendment to create a strong presumption against congressional removal of state limits on elected officials. The Court found the imposition of term limits among the "numerous and infinite" powers remaining with state governments. *Gregory*, 111 S. Ct. at 2399.

Term limits opponents, nevertheless, have argued against applicability of the Tenth Amendment to this debate.[24/] They assert that neither the States nor the people had any residual powers preserved by the Tenth Amendment to specify qualifications for members of the House and Senate, because there was no Congress about which such powers could have existed prior to 1789.[25/] This argument is meritless for two reasons. First, the Tenth Amendment was ratified in 1791, two years after the Constitution, so that it must have applied to the Constitution's allocation of authority.

24/ The general argument that the Tenth Amendment is not a judicially enforceable provision of the Constitution, *see, e.g. Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) (state sovereignty not unconstitutionally invaded by application of Fair Labor Standards Act); Joseph Story, 3 Commentaries on the Constitution of the United States § 1900 (1st ed., 1833) ("mere affirmation . . . that what is not conferred, is withheld, and belongs to the state authorities"), will not be addressed extensively here. This position is clearly untenable in light of the Court's recent decisions in *Gregory*, 111 S. Ct. at 2395 ("[t]he authority of a State's people to determine the qualifications of their most important government officials lies 'at the heart of representative government,' and is reserved under the Tenth Amendment.") and *New York v. United States*, 112 S.Ct. 2408 (U.S. 1992) (State sovereignty, as affirmed in the Tenth Amendment, forbids the Federal Government from compelling states to enact and administer federal regulatory programs).

25/ Levy, *supra*, at 1934-35; 2 Story, *supra*, at §§ 625-26.

Second, in a broader sense, the powers being preserved were all governmental powers not explicitly given the new Federal Government.

Opponents also submit that because Presidential term limits were achieved through constitutional amendment, congressional term limits also can be imposed only by amendment. *See* Brendan Barnicle, Comment, *Congressional Term Limits: Unconstitutional By Initiative*, 67 Wash. L. Rev. 415 (1992). This argument dates back to Justice Story's 2 Commentaries on the Constitution of the United States §§ 625-26 (1st ed. 1833), in which he argues that the States cannot add qualifications for Congress because they cannot add qualifications for President and "[e]ach is an officer of the Union." The fallacy of the argument, both in Justice Story's day and today, is that congressional term limits are distinguishable from Presidential term limits. Members of Congress represent a single State, while the President represents the entire country. A state's regulation of its representatives' qualifications does not impinge upon any other state's rights or on necessary national uniformity. In contrast, state disuniformity of ballots for national office could undermine the very concept of a national election: imagine Arkansas refusing to put George Bush on the presidential ballot and Texas refusing to put Bill Clinton on its ballot!

IV. ARKANSAS' BALLOT ACCESS RESTRICTION DOES NOT VIOLATE THE FIRST OR FOURTEENTH AMENDMENT

A decision by the Court that Arkansas' ballot restrictions are permissible exercises of state power would not provide free reign to the States to adopt abusive restrictions

on who could serve in Congress.[26/] State election requirements are subject to judicial scrutiny under other provisions of the Constitution, especially the First and Fourteenth Amendments.[27/]

Nevertheless, the Court has in fact rejected First and Fourteenth Amendment concerns raised in contexts similar to Arkansas' ballot access restriction. In *Burdick v. Takushi*, the Court held that "the mere fact that a state's system 'creates barriers . . . tending to limit the field of candidates from which voters might choose . . . does not of itself compel close scrutiny.'" 112 S.Ct. at 2063, quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972). The Court's analysis in *Burdick* was simple:

> [w]hen a state election law provision imposes 'reasonable, non-discriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify the restrictions.

26/ Under the Time, Place and Manner Clause, as noted in Part I above, Congress has the authority to overturn state "Manner" restrictions through simple legislation. It is less certain whether Congress has authority to control the states' enactment of additional qualifications. Arguably, *Powell's* limitation of House-adjudicated qualifications to those concerning age, citizenship, and inhabitancy might be extended to Congressionally-legislated additional qualifications, but that is an issue not posed by this case. *See* DeCarli, *supra*, at 874-75; Levy, *supra*, at 1927.

27/ Respondents in this case have failed to preserve any such objections by failing to cross-petition regarding the Arkansas Supreme Court's decision that Amendment 73 did not violate the First and Fourteenth Amendments.

112 S. Ct. at 2063-64, quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983). In *Burdick*, the Court concluded that an election law that barred write-ins created little burden on First or Fourteenth Amendment rights. 112 S. Ct. at 2059. The impact upon the electoral process is far less here than in *Burdick*, where write-in candidates were precluded altogether. So the remaining inquiry would simply be whether the state's interests were sufficient to justify the restrictions. Undoubtedly, they were, as a separate look at the Fourteenth and First Amendments will reveal.

1. *Fourteenth Amendment*. Obviously, racial or gender restrictions would be subject to heightened scrutiny and virtually certain invalidation under the Equal Protection Clause of the Fourteenth Amendment. Indeed, were any State today to adopt a property-holding requirement for election to the House or Senate, it is likely that such a requirement would be invalidated under the Fourteenth Amendment. *See Bullock v. Carter*, 405 U.S. 134 (1972) (large Texas filing fee for candidates violates Equal Protection Clause); *Quinn v. Millsap*, 491 U.S. 95 (1989) (requirement that governmental official own real property violates Equal Protection Clause).

The mere fact that some individuals will have a more difficult time electing their candidate or that some candidates will have a more difficult time getting elected does not pose a serious Fourteenth Amendment concern. Indeed, the Court has indicated that "gerrymandering" laws that attempt to encourage one type of candidate can survive Fourteenth Amendment challenges. *See, e.g. Karcher v. Daggett*, 462 U.S. 725, 740 (1983) (stating that redistricting to avoid contests between incumbents could be legitimate state interest); *Beer v. United States*, 425 U.S. 130, 141 (1976); *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973) (redistricting intended to result in "substantial political consequences").

The Arkansas Constitution's provisions at issue in this case are a far cry from race or gender cases; since there is no invidious classification, minimal or rational basis scrutiny is the appropriate way to evaluate this case. Under this standard, Arkansas' constitutional provision easily passes muster. The Preamble to Arkansas Constitution, Amendment 73, compellingly presents the views of that state's electorate:

> The People of Arkansas find and declare that elected officials who remain in office too long become preoccupied with reelection and ignore their duties as representatives of the people. Entrenched incumbency has reduced voter participation and has led to an electoral system that is less free, less competitive, and less representative than the system established by the Founding Fathers. Therefore, the People of Arkansas, exercising their reserved powers, herein limit the terms of elected officials.

Even if these views ultimately prove erroneous, they are well within the realm of appropriate expressions of public policy. *See generally* George F. Will, Restoration: Congress, Term Limits and the Recovery of Deliberative Democracy (1992) (reviewing public policy arguments concerning the term limits debate). Moreover, the people of Arkansas acted with great restraint in permitting multiterm incumbents to run for office again if written in by the voters; other States have recently

passed term limits legislation barring incumbents from office altogether.[28/]

2. *First Amendment*. The First Amendment also constrains the States from barring candidates for expression of particular political views. *Cf. R.A.V. v. St. Paul*, 112 S.Ct. 2538 (U.S. 1992) (striking a local ordinance for lack of viewpoint or content neutrality). The Arkansas ballot restriction does not violate any of the content or viewpoint neutrality decisions of the Court, for it does not disadvantage independent or third party candidates, or "insulate [voters] from the appeal of new political voices . . .." *Jenness v. Fortson*, 403 U.S. 431, 438-39 (1971) (upholding requirement for showing of support among electorate to gain ballot access).[29/]

The Arkansas provisions fall evenly on all political parties and viewpoints. Broad but neutral prohibitions on political involvement and office-holding have been upheld by the Court, at least when there are strong justifications for such limitations. *CSC v. Letter Carriers*, 413 U.S. 548 (1973) (Hatch Act limitations on partisan political activities do not violate the First Amendment); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973) (state law prohibiting political activity and candidacy by state employees does not violate First Amendment). The Arkansas rule also is far more limited than the restrictions on political activity and candidacy of government employees upheld in *Broadrick* and *Letter*

28/ *See, e.g.*, Michigan Constitution, Article II, section 10; Missouri Constitution Article III, section 45(a); Ohio Constitution Article V, section 8; South Dakota Constitution Article III, section 32.

29/ The Arkansas ballot restrictions may indeed open up the political process to new voices. *See* Gorsuch and Guzman, *supra*, at 341, 372 (Congress heavily dominated by white (93%) and male (95%) members).

Carriers. Significantly, *Clements*, 457 U.S. at 972, held that a state "resign to run" law did not violate the First or Fourteenth Amendment. Although Texas law restricted elected officials from becoming candidates when they wished, they could speak and campaign on behalf of third parties, contribute and expend money in political causes, and hold office in political parties.

Moreover, the Court repeatedly has held that a write-in option such as that provided by Arkansas is a sufficient alternative to printing on the ballot to avoid First and Fourteenth Amendment concerns. *Storer*, 415 U.S. at 736 n.7; *Jenness*, 403 U.S. at 434, 438, 439. In *Storer* the Court upheld a California statute that denied ballot access to any independent candidate who had supported a political party within the preceding year. 415 U.S. at 724. In sum, the Arkansas law does not violate the First Amendment because it places only a *de minimis* burden on the rights of speech and association.

Even if Arkansas' ballot restrictions did impose a burden on speech and association rights, however, it would still pass muster under the Court's decisions. *Buckley v. Valeo*, 424 U.S. 1, 25 (1976), established that even a law which significantly interferes with First Amendment rights can pass constitutional muster if the State "demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms."

The important governmental purposes, set forth in the Preamble, are to reduce the power of entrenched incumbents "preoccupied with reelection" who ignore their duties, to increase voter participation, competition, and quality of representation. It increases the chance for a government

> more sensitive to the diverse needs of a heterogeneous society, it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government, and it makes government more responsive . . . .

Gregory, 111 S. Ct. at 2399. These purposes are far more compelling than merely "equalizing the relative financial resources of candidates," an interest found insufficient to override a candidates' strong First Amendment right in speaking on behalf of his own candidacy in *Buckley*, 424 U.S. at 54.[30/]

Although the Arkansas ballot access restriction need not be narrowly drawn because it has little impact upon First Amendment rights, *see Burdick*, 112 S. Ct. at 2059, the law is, in fact, narrowly drawn. It does not prevent anyone from writing in a vote for a multiterm incumbent, and it does not bar a multiterm incumbent from office. The ballot restriction is carefully tailored not to incapacitate incumbents, while helping competitors for office who are badly disadvantaged because they do not have the franking privilege, staff support,

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30/ It is significant that the Arkansas ballot rule was enacted, not by the legislature, but by popular initiative. Prior cases that have involved successful First Amendment challenges to balloting restrictions concerned state legislation. *E.g. Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989) (legislature-passed regulation that prevented political parties from endorsing any candidate in the primary election violates First Amendment). Legislative action may be suspect because it is politically partisan or motivated by a desire to control administrative costs. Because the electorate's First Amendment rights are at stake, and the electorate itself is imposing the limit, rather than the legislature, there is some guarantee that the initiative does not stifle free speech.

the ability to channel federal money to influence votes, or the name recognition of incumbents. *See Buckley*, 424 U.S. at 31 n.33 ("[I]t is axiomatic that an incumbent usually begins the race with significant advantages.")

In sum, the modest restriction on multi-term incumbents -- keeping their names off the ballot -- is appropriate and tailored to address the specific problems articulated in Amendment 73's preamble while preserving an open electoral process. It does not impermissibly classify, discriminate, or impinge upon rights of expression or association.

CONCLUSION

For the reasons set forth herein, the decision of the Supreme Court of Arkansas should be reversed.

Respectfully submitted

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